

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



(b)(6)

**U.S. Citizenship
and Immigration
Services**

[REDACTED]

DATE: DEC 23 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on November 5, 2013. In the Form I-129 visa petition, the petitioner describes itself as a medical school established in [REDACTED]. The petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on April 9, 2014, finding that the Labor Condition Application (LCA) was not certified for the proper occupational category. Specifically, the director stated that the duties of the proffered position do not correspond to the occupational category of "Health Specialties Teachers, Postsecondary" - SOC (O*NET/OES) code 25-1071 as designated on the LCA.¹

On appeal, the petitioner reported that it is an institution of higher education and that it utilized the Occupational Employment Statistics (OES), American Competitiveness and Workforce Improvement Act (ACWIA) – Higher Education Database. See 212(p)(1) of the Act, 8 U.S.C. § 1182(p)(1); 20 C.F.R. §§ 655.731(a)(2)(vii), 656.40(e). The petitioner further stated that the ACWIA – Higher Education Database does not contain the occupational category "Physicians" and, therefore, it selected the occupational category that it determined to be the closest match.

We reviewed the record of proceeding and issued a Request for Evidence (RFE).² In the RFE, we noted that the burden is on the petitioner to establish that the occupational category used in support of an LCA corresponds to the job offer. Section 291 of the Act, 8 U.S.C. § 1361. We asked the petitioner to submit a request to the U.S. Department of Labor (DOL), National Prevailing Wage Center (NPWC) for a prevailing wage determination (PWD) to ascertain the appropriate occupational category for the proffered position. In response to our RFE, the petitioner submitted the requested PWD, which states that the occupational category "Internists, General" does not currently have an ACWIA – Higher Education wage available through OES and that the wage for the occupational category "Health Specialists Teachers, Postsecondary" was appropriate as the duties of the proffered position are a combination of occupations.³ We conclude that, on appeal, the petitioner has met its burden of proof on this matter and has overcome the director's ground for denial of the petition.

¹ The U.S. Department of Labor (DOL), Bureau of Labor Statistics (BLS) provides wage data collected under the Occupational Employment Statistics (OES) program for use in the Foreign Labor Certification process. The wage data is available on the Foreign Labor Certification (FLC) Data Center Online Wage Library. In the instant case, the petitioner indicated on the LCA that it used the FLC Online Data Center in determining the prevailing wage for the proffered position.

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

³ When an employer obtains a PWD from the NPWC, DOL will accept that wage as correct and will not question its validity, i.e., the employer is granted "safe harbor" in connection with the request. 20 C.F.R. § 655.731(a)(2)(ii)(A)(3). It is important to note, however, that this "safe harbor" cannot be accorded to employers who fail to fully and/or accurately describe the position, including such aspects as the tasks, work

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has been met.

ORDER: The appeal is sustained. The director's decision dated April 9, 2014 is withdrawn, and the petition is approved.

activities, knowledge, skills, and specific vocational preparation (education, training, and experience) that are considered by the NPWC for its determining of the nature of the job and wage level. Cf. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.